Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 10

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES B. THOMPSON,

Petitioner

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Respondent,

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Federal Circuit

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Dated: May 7, 2010

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Note: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-7070

JAMES B. THOMPSON

Claimant-Appellant,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs

Respondent-Appellee.

Judgment

ON APPEAL FROM	United States Court of Appeals for veterans Claims
CASE NO.	04-2176

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MAYER, LOURIE, and PROST, Circuit Judges)

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

Dated: October 13, 2009 /S/ Jan Horbally, Clerk

ISSUED AS A MANDATE:

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR

VETERAN'S CLAIMS

No. 04-2176 JAMES B THOMPSON, APPELLANT,

V.

R. JAMES NICHOLSON,
SECREARY OF VETERANS AFFAIRS, APPELLEE.

Note: Pursuant to U.S. Vet. App. R. 30(a) this action may not be cited as precedent.

MOORMAN, *Judge:* The appellant, James B. Thompson, appeals through counsel September 3, 2004, Board of Veterans' Appeals (Board) decision that determined that new and material evidence to reopen his claims for entitlement to service connection for a low back disorder and for asthma had not been received. Record (R.) at 1-9. Both parties have filed briefs, and the appellant has filed a reply brief. On appeal, Mr. Thompson argues that VA failed to comply with its duties to notify and assist him with his claims. *See* Appellant's Brief (App. Br.) at 6-18. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). A single judge may

conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will affirm the September 2004 Board decision.

Mr. Thompson served on active duty in the U.S. Army from December 1961 to September 1964. R. at 13. In January 2000, Mr. Thompson filed claims for service connection for a low back condition and asthma. R at 57-58. In March 2000 and May 2001, a VA regional office (RO) denied Mr. Thompson's claims because the evidence failed to show that his low back strain or asthma were incurred in or aggravated by his period of service or that there was evidence of a nexus between the conditions and service. R. at 136-41, 143-46. Mr. Thompson did not appeal the May 2001 RO decision, and it became final.

In July 2002, Mr. Thompson requested that the RO reopen his claims for service connection for, inter alia, low back strain and asthma. R. at 148. In August 2002, the RO sent Mr. Thompson a letter informing him of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096. R. at 340. In December 2002, the RO declined to reopen Mr. Thompson's claims. R. at 367-70. Mr. Thompson filed a

confusing framework of the brief.

The appellant's brief also relies heavily on boilerplate recitation of the law, but is very light on analysis. For example, section E of the appellant's opening brief is approximately five pages in length, approximately four sentences of which the Court Construes as analysis of how he was prejudiced by a lack of VCAA notice. *See* App. Br. at 14-18. In this regard, the appellant's counsel appears to have pasted several block quotes from an online legal research database into his brief, all of which appear without explanation or citation to the proper authority. *See* App. Br. at 8-9,11-13, 15. Equally egregious is that the appellant's counsel apparently could not be bothered to remove citations to the online database's page division demarcations and hyperlinks to the authorities contained therein. *See id.* Finally, the Court notes that the format of the appellant's opening brief consists of different typefaces, and large portions of both the appellant's opening brief and reply brief appear to be unedited or unfinished and are replete with spelling and grammatical errors. *See, e.g.*, App. Br. at 10 ("These notices left the appellant with no understanding of the issues to be adjudicated per *Pelegrini v. Principi*, 18

inform the appellant of what evidence was necessary to substantiate his claim is presumptively prejudicial. *See Overton v. Nicholson,* 20 Vet.App. 427, 436 (2006); *Mayfield v. Nicholson,* 19 Vet.App. 103, 120-21 (2005), *rev'd on other grounds, Mayfield v. Nicholson;* 444 F.3d 028 (Fed. Cir. 2006). The provisions of the VCAA apply to claims to reopen a previously denied claim, and the Court has held: "VA must notify a claimant of the evidence and information that is necessary to reopen the claim and VA must notify the claimant of the evidence and information that is necessary to establish his entitlement to the underlying claim for the benefit sought by the claimant." *Kent v. Nicholson,* 20 Vet.App. 1, 9 (2006).

The appellant's first argument concerning the duty to notify is that "VA must explain what evidence must be submitted to win this claim and what evidence this claim is lacking." App. Br. at 8. However, this argument is without merit because the Secretary has no duty to provide this type of notice. *See Locklear v. Nicholson,* 20 Vet.App. 410, 415-16 (2006) (stating that section 5103(a) does not require "predecisional adjudication' of evidence and "the duty to notify deals with evidence gathering, not the analysis of already gathered evidence").

The appellant also contends that "the Secretary

failed to adjudicate the May 2001 Rating Decision since the VCAA notices prior to that time were not in accordance with the VCAA 2000." App. Br. at 6. The Court has no jurisdiction to consider this argument because the May 2001 RO decision became final when the appellant failed to file a timely appeal following that decision. However, to the extent that the appellant argues that VA failed to satisfy its duty to notify him with respect to his July 2002 request to reopen his claims, the Court has jurisdiction to address this argument because it was the subject of a timely-appealed final Board decision. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi*, 17 VetApp. 475, 477-78 (2004); *Bondy v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) (holding that the Court's jurisdiction is confined to a review of final Board decisions adverse to the claimant).

With respect to his July 2002 request to reopen, the Board found that VA provided the appellant with VCAA notice in the August 2002 letter from the RO. *See* R. at 3. The Court concludes that the Board erred in this regard because, although this letter generally informed the appellant that he needed new and material evidence to reopen his claims, it did not contain notice that was sufficiently tailored to the appellant's claims to

reopen. *See* R. at 3; *see also Kent, supra; Locklear,* 20 Vet.App. at 416. Specifically, the August 2002 letter did not describe what information or evidence was necessary to substantiate the elements required to establish service connection that were found insufficient in the previous denial. *See R.* at 340-41; *Kent,* 20 Vet.App. at 10 ("[T]he VCAA requires the Secretary to look at the bases for the denial in the prior decision and to respond With a notice letter that describes what evidence would be necessary to substantiate that "element or elements required to establish service connection that were found insufficient in the previous denial. Therefore, the question of what constitutes material evidence to reopen a claim for service connection depends on the basis on which the prior claim was denied"). Having found error, the Court must take due account of the rule of prejudicial error. *See Conway V. Principi,* 353 F.3 d 1369, 1375 (Fed. Cir. 2004); *Overton,* 20 Vet.App. at 433. To do so, the Court will examine the entire record to determine whether the appellant had a meaningful opportunity to participate in the processing of his claims.

In its March 2000 decision; the RO denied service connection for low back strain and asthma because the evidence failed "to establish any relationship between

[the conditions] and any disease or injury during military service." R. at 140. The December 2002 RO decision also informed the appellant that, in order to reopen his claims, he needed to provide medical evidence that the conditions had their onset during service. *See R.* at 369-70. The RO further informed the appellant that in order to reopen his claims, he must provide new and material evidence. *See* R. at 369 (stating that he must provide evidence that had "not been previously submitted and reviewed and which bears directly and substantially upon the claim" and providing that "[m]aterial evidence means the evidence shows that you have the disability and that it began or got worse while you were on active duty"). The November 2003 SOC also stated that the appellant had failed to submit any medical evidence that his degenerative back condition and asthma were incurred in *service*. *See* R. at 483-84. Moreover, contrary to the appellant's arguments, the appellant was informed that he could submit evidence in the form of medical opinions or lay statements. *See* App. Br. at 5, 8, 17, 18. The August 2002 letter specifically informed the appellant: "[Y]ou can give us a medical opinion from your own doctor." R. at 341. The letter also informed the appellant,

under a subheading reading "What Type of Evidence Should You Submit?", that he should provide the RO with inter alia, "a statement from your doctor, including the physical and clinical findings" or "statements from other people who can describe how your disability has become worse." *Id.* Finally, the letter stated: "If you have not recently been examined or treated by a doctor you may submit your own statement." R. at 342.

The record on appeal also demonstrates that the appellant was aware of what evidence had not been submitted previously, and he had actual knowledge of the evidence required to substantiate his claims for service connection for his conditions. *See Mayfield,* 19 Vet.App. at 121 (noting that no prejudice exists when a Claimant has actual knowledge of the evidence required). In response to the August 2002 RO letter, the appellant submitted a statement, along with private medical records, that he was treated for his conditions during service. *See* R. at 360-65. In the July 2003 NOD, he also indicated personal knowledge regarding the need for medical evidence to support his claims. *See* R. at 374. Moreover, the appellant testified at the May 2004 Board hearing that he received medical treatment for 'asthma from 1964 through 1966, but that the private

physicians who provided that treatment were deceased and records could not be secured. *See* R. at 546-47. He further stated that he was under the care of a doctor for his back condition shortly after service, but could not locate any record of this treatment. R. at 553-56. Finally, the appellant demonstrated actual knowledge that he could submit medical opinions when he acknowledged in his July 2003 NOD that " [medical evidence includes such things as . medical opinion." R. at 374. The appellant again demonstrated this knowledge when he submitted to the RO a July 2001 private examination report and requested that a VA physician evaluate him and provide the RO with a medical opinion. *See* R. at 361-65, 561. Thus, in light of the aforementioned correspondence and the appellant's actual knowledge of the information and evidence necessary to substantiate his claims, as evidenced by his active participation in developing the additional evidence, the Court concludes that the appellant had an opportunity to meaningfully participate in the adjudication of his claim, and did so participate; therefore, he was not prejudiced by VA's failure to comply with the first statutory notice element. *See Conway*, 353 F.3 d. at 1375; *Overton*, 20 Vet.App. at 433; *see also Kent*, 20 Vet.App. at 10.

With regard to the second and third elements of notice, the appellant has not specifically alleged that he was prejudiced by the lack of notice. Accordingly, the Court holds that the Board's error in finding that VA had fulfilled its duty to notify the appellant was nonprejudicial as to these claims. *See Overton,* 20 Vet.App. at 435 ("[T]he appellant, generally bears the burden of showing how any error is prejudicial or has affected the essential fairness of the adjudication."); *Marciniak* v. *Brown,* 10 Vet.App. 198, 201 (1997) (holdng that VA error was not prejudicial where "appellant has not alleged with specificity any prejudice that resulted from [such error]"); *Parker v. Brown, 9* Vet.App. 476, 480-81. (1996) (same).

The appellant also argues that VA failed to comply with the duty to assist when it did not comply with his request to obtain various private medical records. *See* App. Br. at 13-14. The Secretary has a duty to assist pursuant to 38 U.S.C. § 5103A(a), under which he must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. § 5103A(a)(1). If the evidence obtained

indicates that there is no reasonable possibility that further assistance would substantiate the claim, VA may discontinue such efforts. *See id.Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1355-57 (Fed. Cir. 2003) (holding that, pursuant to section 5103A(a)(2), the Secretary "is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim"). In the instant case, the Board found that VA fulfilled its duty to assist, recognizing that the appellant "stated that records from his private doctors were no longer available." R. at 4. The Court agrees. At the May 2004 Board hearing, both the appellant and his representative testified that the medical records could not be obtained. *See* R. at 546-47. Therefore, the Court concludes, given the appellant's own assertions that these records were impossible to obtain, that VA complied with the duty to assist.

The Court will not address any arguments that the appellant may have intended to set forth in sections C and D of his opening brief. The appellant's third argument is entitled: "C. The appellant's failure to receive any VCAA notice from the RO prior to the May 24, 2001 Rating decision means that adjudication

was never completed, is still pending, was never adjudicated and that such failure was clearly erroneous and that such failures were prejudicial to the appellant." App. Br. at 14., However, the entirety of the argument presented instructs e Court to " [S]ee facts above." *Id.* The appellant's fourth argument is entitled: "D. The Board Did Not Account for All the Favorable Evidence and Therefore Did Not Base its Decision on the Entire Record or All the Evidence 38 U.S.C. 7104(a)." Id. Similarly, the brief presents no actual argument in support of this subheading.

Pursuant to Rule 25 of the Court's Rules of Practice and Procedure (Rules), the appellant's brief must contain, *inter alia,* "an argument, beginning with a summary and containing the appellant's contention with respect to the issue and the reasons for those contentions, with citations to the authorities and parts of the record on appeal relied on." U.S. VET. APP. R. 28(a)(5). The Court holds that the arguments made in the appellant's opening brief are wholly lacking in "the reasons for those contentions." The attempt to condense the entirety of two arguments into two separate subheadings consisting of single, run-on sentences with no subsequent analysis

does not conform to the requirements of Rule 28: Moreover, it is the appellant's obligation to "plead with *some* particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments." *Coker v. Nicholson*, 19 Vet App. 439, 442, (2006); *see also Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995) (holding that an appellant, who comes to a court of appeals as the challenger of an underlying decision, "bears the burden of demonstrating the alleged error and the precise relief sought"). The appellant has not done so here. Consequently, the Court finds that, as presented, the appellant's remaining arguments are without merit.

Indeed, the entirety of the appellant's opening brief is remarkable only for its overall unhelpfulness. Although the appellant's counsel has included a table of contents in his opening brief as mandated by Rule 28 of this Court's Rules, the table of contents provides incorrect page citations to one section of his brief and redundantly refers to the section entitled "Statement of Issues Presented for Review" twice. *See* App. Br. at ii; U.S. VET. APP. R. 28(a)(1). In the Table of Authorities section of his opening brief the appellant's

counsel includes multiple entries to 38 U.S.C. § 5103(a), 38 C.F.R. §3.159(b), and three precedential Court decisions; yet, he does not list in this section many of the authorities on which he relies in the body of his brief. *See* App. Br. at iii; *see also U.S.* VET. APP. R. 28(a)(2). These are examples of the easily preventable errors that only contribute to the delay involved in the processing of a veteran's appeal.

The next section of the appellant's opening brief, entitled "Statement of Issues Presented for Review," is rudimentary at best as the appellant's counsel merely has pasted into this section the subheadings as they appear in the argument section of his brief. *See* App. Br. at 1-2. An effective brief *assigns* a heading for each issue, ensuring that each heading consists of a forceful, yet concise, declaration of the argument, and does not analyze more than one issue under a single heading. The subheadings contained within this brief consist of single, run-on sentences, several of which are disorienting and rambling. This approach does not reflect well on the practitioner's professionalism.

Pursuant to Rule 28 of this Court's Rules, the appellant's brief also must contain "a statement of

the case, showing briefly the nature of the case, the course of proceedings, the result below, and the facts relevant to the issues, with appropriate references to the record on appeal." U.S. VET. APP. R. 28(a)(4). The statement of the case should include a thorough, yet concise, overview of the background of the case, which adequately separates argument from fact. Not only does most of this section in the appellant's opening brief consist largely of argument, but the facts —what little of the facts the appellant's counsel chooses to discuss — are not presented in any semblance of order that is beneficial for review.

The argument section of the appellant's opening brief *is* woefully inadequate as well. Throughout the brief, the appellant's counsel makes vague, sweeping statements in reference to particular errors, immediately directing the reader to refer to a separate, and unspecified, portion of the brief. *See, e.g.*, App. Br. at 6 ("This case requires that the VCAA be considered in the Appellant's case. See the facts above."); *see also, e.g.*, App. Br. at 4, 10, 14. The appellant's counsel's habit of instructing the Court to refer to other portions of his analysis serves only to add to the

Notice of Disagreement (NOD) in July 2003, and he was afforded a VA medical examination in September 2003. R. at 374, 464-66. In November 2003, the RO issued a Statement of the Case (SOC) *in* which it found that the September 2003 VA examination constituted new and material evidence sufficient to reopen the claim; however, the RO denied service connection for both conditions based on a lack of evidence that the conditions began in service. R. at 472-85. Mr. Thompson filed *a* Substantive Appeal, and, in. May 2004, Mr. Thompson was afforded a hearing before the Board. R. at 546-58. In September 2004, the Board issued the decision on appeal. R. at 1-9.

Pursuant to the VCAA, the Secretary is required to inform the claimant of the in formation and evidence not of record (1) that is necessary to substantiate the claim, (2) that the Secretary will seek to obtain, if any, and (3) that the claimant is expected to provide, if any. *See* 38 U.S.C. § 5103 (a); *Quartuccio v. Principi,* 16 Vet.App. 183, 187 (2002). The Secretary is also required to "request that the claimant provide any evidence in the claimant's possession that pertains to the claim." 38 C.F.R. § 3.159(b)(1) (2006); see *Pelegrini v. Principi,* 18 Vet.App. 112, 121 (2004). The Secretary's failure to

Vet App. 112 (2004)[",] that was decided *before/after* the [Board] decision that is the subject of this appeal.") (emphasis added); Appellant's Reply Brief at 2 ("VA has Satisfied its duty to notify by means of a letter from the *ER read* to the veteran in. August 2002.") (emphasis added). The appellant's counsel also refers to different veraions of pertinent regulations with no explanation for doing so; mischaracterizes statements contained in. the underlying Board decision; and provides no record citations for any of his arguments. The Court does not tolerate substandard briefs. Whether his filings were the product of laziness, ineptitude, and/or lack of respect for this Court's Rules, the appellant's counsel has caused a great disservice to one of our Nation's veterans.'

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's September 3, 2004, decision is AFFIRMED.

DATED: MAR 13 2007

Copies to:

Hugh D. Cox, Esq.

failteS B. Thompson

[1] Perhaps the source of the confusion regarding the incorrect page citation in the table of contents is that the opening brief does not contain a page "1" and instead begins at page "ii."